BUMIPUTRA COMMERCE BANK BHD

v.

MAHKAMAH PERUSAHAAN MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[ORIGINATING SUMMONS NO: R1-25-13-2000]
22 MARCH 2004

LABOUR LAW: *Employment - Dismissal - Decision of Industrial Court that employee unjustly dismissed - Domestic inquiry conducted by employer prior to dismissal - Jurisdiction and duty of Industrial Court in instances of domestic inquiry - Whether Industrial Court misconstrued and misapplied principles of law*

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - Decision of Industrial Court that employee unjustly dismissed - Domestic inquiry conducted by employer prior to dismissal - Jurisdiction and duty of Industrial Court in instances of domestic inquiry - Whether Industrial Court misconstrued and misapplied principles of law*

This was an application by the applicant for an order of *certiorari* to quash an award of the Industrial Court deciding that the second respondent, an officer of the applicant, had been dismissed without just cause or excuse, and entitled to backwages and compensation *in lieu* of reinstatement. The second respondent had been charged with various offences, and upon the conclusion of a domestic inquiry, subsequently dismissed. The applicant's main submission was that the Industrial Court, in hearing the matter *de novo*, had failed to consider whether or not the domestic inquiry was valid and inquiry notes accurate, and thus, had taken into account certain irrelevant factors instead of relevant ones in reaching its decision. The applicant averred that when a domestic inquiry was conducted by an employer prior to a dismissal, the Industrial Court was under a duty to first consider and determine whether the inquiry was proper, and if it was, not to proceed to hear the matter *de novo* but to determine whether a *prima facie* case had been made against the employee.

Held (allowing the application):

[1] The Industrial Court's jurisdiction, in instances where a domestic inquiry has been held, was limited to considering whether there was a *prima facie* case against an employee. Thus, in the present case, the Industrial Court should have first considered whether or not the domestic inquiry was valid and the inquiry notes accurate. In the absence of such considerations, the

Industrial Court's action in proceeding to decide the matter without any regard to the notes of inquiry could not be described as anything more than an error of law. Accordingly, the conclusion of the Industrial Court that all charges preferred against the second respondent were not proven could not be supported and was, in fact, contrary to the clear evidence of the case. Since it was apparent from the records that the Industrial Court had misconstrued and misapplied the principles of law pertaining to the relevance of a valid domestic inquiry, this court was compelled to exercise its powers of judicial review to issue an order of *certiorari* to quash the award. (pp 82 g-h, 83 h & 85 c-d)

Case(s) referred to:

Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Anor [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39 SC ***(refd)***

Ganesan G Suppiah v. Mount Pleasure Corp Sdn Bhd [1998] 1 CLJ 637 SC ***(refd)***

Metroplex Administration Sdn Bhd v. Mohamed Elias [1998] 5 CLJ 467 HC ***(foll)***

Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 ***(dist)***

Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd [1997] 1 CLJ 646 SC ***(refd)***

UMW Toyota (M) Sdn Bhd v. Chow Weng Thiem [1996] 5 MLJ 678 ***(refd)***

Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 ***(dist)***

Workmen of the Motipur Sugar Factory Private Ltd v. The Motipur Sugar Factory Private Ltd AIR [1965] SC 1803 ***(refd)***

Legislation referred to:

Banking and Financial Institutions Act 1989, ss. 105, 115(1)

Employment Act 1955, s. 14(1)

Industrial Relations Act 1967, s. 20(1), (3)

For the applicant - A Selvamalar; M/s Skrine

For the 2nd respondent - P Vickneswaren (Kavin Lim); M/s Murugavell Arumugam & Co

[The 2nd respondent has appealed to the Court of Appeal vide Civil Appeal No: W-04-56-04]

Reported by Suresh Nathan

JUDGMENT

Raus Sharif J:

This is an application by Bumiputra-Commerce Bank Berhad (the applicant) for an order of *certiorari* to quash the Industrial Court Award No. 690 dated 20 December 1999. In the said award, the Industrial Court found that the

second respondent had been dismissed without just cause or excuse. Consequently, the Industrial Court ordered back wages and compensation *in lieu* of reinstatement as follows:

(i) the second respondent to be paid back wages from the date of dismissal (27 December 1995) to the final date of hearing (10 June 1999) subject to the maximum of 24 months, that is, RM2,600 x 24 = RM62,400;

(ii) the second respondent shall be paid in lieu of reinstatement one month's salary for every year of completed service from the date of joining (1 June 1989) to the final date of hearing (10 June 1999), that is, RM2,600 x 18 = RM46,800.

Briefly, the factual background that led to this application by the applicant are as follows.

The second respondent joined the services of the applicant's bank on 1 June 1981 beginning as a clerk. He was then promoted to the position of officer in Grade II effective 1 June 1990. On 3 June 1993 he was then again promoted to the position of Assistant Manager of Credit. On 7 March 1994, he was subsequently promoted to the level of Grade 10 effective from 1 July 1993. His last basic salary was RM2,600 per month.

By a letter dated 14 April 1995, the applicant levelled three charges against the second respondent. The charges read as follows:

1. That you had abused your position as an officer of the bank and brought your private interest into conflict with your duties as such, when you deliberately arranged for the granting of overdraft facilities to the below mentioned customers and after approval thereof utilized the said facilities, either by operating and/or exercising control over the operation for the relevant correct accounts and your personal benefits.

Name of Customer	Account No.	A/A No.	Date of Approval	Amount
1. Mohd. Lofti Hussin and Zainatul Husniah bt. Hussin	4421-03	OD/S/ 92018	29.01.1992	50,000.00
2. Azizah Abas & Noraini Abas	4496-55	OD/MC/ 92046	27.02.1992	50,000.00

You had, therefore contravened the Treasury and Investment banking Circular No. 88/47 P.U. No. 381: Code of Ethics dated 12 December 1998.

2. In furtherance to Charge No. 1 above, you had, by utilizing the said overdraft facilities, thereby directly or indirectly received or agreed to receive a facility for your personal pecuniary benefit or advantage.

   You had therefore, contravened s. 115(1) of the Banking And Financial Institutions Act 1989.

3. That you had, with intent to deceive, added another signature on the specimen signature cards pertaining to the current account of customers as mentioned in charge No. 1 above, and thereby you made or caused to be made false entry in the bank's document.

   You had therefore, contravened s. 105 of the Banking And Financial Institutions Act 1989.

A domestic inquiry was held against the second respondent on 8 November 1995. Resulting from the domestic inquiry, the second respondent was dismissed on 27 December 1995.

The second respondent filed a representation under s. 20(1) of the Industrial Relations Act 1967 (the Act) as he considers his dismissal was without just cause or excuse. Pursuant to s. 20(3) of the Act, the Honourable Minister of Human Resource referred the matter to the Industrial Court. The Industrial Court decided in favour of the second respondent. Hence, the applicant is now challenging the award.

The applicant in support of this application advanced a number of grounds. Basically, the main complaint of the applicant is that the Industrial Court was wrong to hear the matter *de novo*. In hearing the matter de novo, it is submitted by the applicant that the Industrial Court failed to consider whether or not the domestic inquiry was valid and whether the inquiry notes are accurate. Thus, according to the applicant, the Industrial Court in coming to the conclusion that all charges preferred against the second respondent were not proven, had failed to take into account certain relevant factors but took into account certain irrelevant factors in making its decision.

The Industrial Court in deciding to hear the matter *de novo* relied on the decisions of *Wong Yuen Hock* and *Milan Auto (supra)* to support its decision. The learned Chairman said as follows:

Bearing in mind the decisions of *Wong Yuen Hock* and *Milan Auto Sdn. Bhd.* cases *(supra)* the Court is of the view that this matter should be considered de novo in the hearing before this Court and that it is incumbent upon the Court to consider whether each of the charge has been properly proceeded by the Bank.

It is the submission of the learned counsel for the applicant that the Industrial Court has misinterpreted the principle established in the two cases. According to her, when a domestic inquiry was conducted by an employer prior to a dismissal, the Industrial Court was under a duty to first consider and determine whether the inquiry was proper. Upon such consideration, if the court arrived to a finding in which the due inquiry had been carried out, the Industrial Court should not proceed to hear the matter *de novo* but to consider whether a prima facie case has been made out against the employee.

The learned counsel for the second respondent, on the other hand, contended otherwise. He submitted that following the decisions of *Wong Yuen Hock* and *Auto Milan*, the duty of the Industrial Court to consider a reference under s. 20 of the Act are:

(a) whether a misconduct or irregularities complaint of was in fact committed by the workmen; and

(b) if the workmen did commit the misconduct or irregularities whether it constituted just cause or excuse to dismiss the workmen or in other words whether the punishment of dismissal is justified based on the proven facts of the case.

Thus, according to him, there is no requirement for the Industrial Court to firstly determine the validity of the domestic inquiry which was conducted by the applicant. Instead, it is incumbent for the Industrial Court to determine the second respondent's case *de novo* on the merit of the case.

In order to properly appreciate this important principle of law pertaining to the effect of a domestic inquiry has on the Industrial Court proceeding, it is necessary to look at its development.

Prior to the Supreme Court's decision of *Dreamland Corp (M) Sdn. Bhd. v. Choong Chin Sooi & Anor.* [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39, the position in Malaysia was that failure by an employer to conduct a domestic inquiry prior to dismissal for misconduct, automatically resulted in a finding of unjust dismissal by the Industrial Court. In the *Dreamland* case, the Supreme Court referred to the Indian Case of *Workmen of the Motipur Sugar Factory Private Limited v. The Motipur Sugar Factory Private Limited* AIR [1965] SC 1803 where it was held by the Indian Supreme Court that, "Where an employer has failed to make an inquiry before dismissing or discharging a

workman it is open to him to justify his action before the tribunal by leading all relevant evidence before it. The entire matter would be open before the tribunal. …". The Malaysian Supreme Court succinctly stated that having considered the aforesaid Indian case, they "propose to say nothing more beyond saying that it is in accord with our view of the law in the instant appeal".

Thus, the position has effectively changed so that failure on the part of an employer to hold an inquiry was no longer considered fatal. Nevertheless, there were attempts by our courts to distinguish this principle in cases where the contractual position as between the employer and employee provided for an inquiry to be held and also in instances where the employee came within the purview of the Employment Act 1955 since the Act in s. 14(1) expressly requires an inquiry to be held before dismissal. This distinction was done away with by the *Wong Yuen Hock* and *Milan Auto* cases.

However, the Supreme Court in *Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Renganathan) v. Malayan Breweries (Malaya) Sdn. Bhd.* [1997] 1 CLJ 646 revived the distinction as far as employees under the Employment Act 1955 are concerned. The Supreme Court distinguished *Dreamland* and *Wong Yuen Hock* and held that where an employee is an employee within the meaning of the Employment Act 1955 he has by s. 14(1) thereof a statutory right to "due inquiry".

Abdul Kadir Sulaiman 'J' in *Ganesan G Suppiah v. Mount Pleasure Corp. Sdn. Bhd.* [1998] 1 CLJ 637 declined to follow *Said Dharmalingam* and instead followed the earlier cases of *Dreamland* and *Wong Yuen Hock*.

In none of these cases however, was it laid down that the Industrial Court is duty bound to conduct a *de novo* hearing even where a due inquiry has been conducted by the employer. The Federal Court cases of *Wong Yuen Hock* and *Milan Auto* are cases where domestic inquiries were not held.

Thus, I am of the view that the principle laid down in both cases cannot be said to extend to instances where a domestic inquiry has been held. As such, I am in agreement with the submission of the learned counsel for the applicant that where due inquiry has been held, the Industrial Court's jurisdiction is limited to considering whether there was a *prima facie* case against the employee. This proposition is not without support. In *Dreamland* itself, the Supreme Court, after referring to the Indian case of *Motipur Sugar Factory*, held that, "In India, it seems the failure is not fatal to the employer and he would be entitled to justify it before the Industrial Tribunal. If he had held the inquiry, he should have been told that they would not interfere unless they

want the inquiry to be fair." The Supreme Court enunciated this before going on to say that the passage referred to in the *Motipur*'s case is in accordance with their view of the law.

In *UMW Toyota (M) Sdn. Bhd. v. Chow Weng Thiem* [1996] 5 MLJ 678 Abdul Malik Ishak 'J' held that in light of the employee's admission at the domestic inquiry, the court was under no further obligation to make any further inquiry and a decision or an order could be made based on the admission. Although this was an appeal from a civil claim brought by the dismissed employee, I am of the view that the principle remains the same.

In *Metroplex Administration Sdn. Bhd. v. Mohamed Elias* [1998] 5 CLJ 467, Low Hop Bing 'J' in considering a *certiorari* application to quash an Industrial Court's Award held as follows:

> Where a domestic inquiry is held and the rules of natural justice have been applied, the Industrial Court should first consider the adequacy or otherwise of the procedure adopted in the proceedings for the domestic inquiry in order to determine whether the domestic inquiry has applied the correct procedure and reached the correct conclusion having regard to all the evidence, documentary and oral, adduced at the domestic inquiry. If at the domestic inquiry, the rules of natural justice were properly applied, the employee being given the opportunity to be heard and to present his case, and should a finding be made against the employee based on the evidence which was presented to the domestic inquiry, the Industrial Court ought to consider the finding of the domestic inquiry in order to conclude whether the employee has been dismissed without just cause or excuse. The rule that a domestic inquiry should be held is after all a rule of the court's own devising.

In the instant case, the Industrial Court did not address the issue whether a proper domestic inquiry had been held and whether the conclusion reached by the inquiry panel was perverse. Thus, clearly the Industrial Court has misinterpreted the decision in *Wong Yuen Hock* and *Milan Auto* and erroneously decided that the matter should be considered *de novo*. To me, the two cases are cases where a domestic inquiry was not held, and therefore, distinguishable. Furthermore, neither of the said cases has the proposition laid down which would be inevitable for the Industrial Court to ignore the fact that a valid inquiry had been carried out and thus, simply proceed to hear the matter *de novo*.

Thus, I am of the view that in cases of this nature, the Industrial Court should first consider whether or not the domestic inquiry was valid and whether the inquiry notes are accurate. In the absence of such consideration and a finding on the validity of the domestic inquiry and accuracy of the inquiry notes, the Industrial Court's action in proceeding to decide the matter without any regard

to the notes of inquiry cannot be described as anything more than an error of law. Accordingly, the conclusion of the Industrial Court that all charges preferred against the second respondent were not proven could not be supported and infact, contrary to evidence.

The charges against the second respondent involved conflict of interest between the second respondent's private interest and that of the applicant whereby the second respondent had either directly or indirectly derived benefits or advantages and the allegation that he had added another specimen signature to the records of the applicant's customers. The Industrial Court in its findings that the second respondent was not proven to have made used or exercised control over the accounts stated, for there is no evidence that the claimant made use or try to use the said accounts or exercised control of the account for his benefit.

I am of the view in coming to the said conclusion, the Industrial Court had failed to take into consideration the evidence of the second respondent himself at the domestic inquiry, bearing in mind the notes of inquiry had been accepted by court as an exhibit. The second respondent confirmed that he kept the cheque book of the customer. Again there was evidence given by COW3 during the Industrial Court's hearing that the second respondent had told him during the investigation that he kept the cheque book and also that he signed the cheques.

The Industrial Court had also failed to take into consideration the fact that the facility in question was for the purpose of investment namely purchase of shares which had been utilized to settle a loan due to the second respondent. Although the Industrial Court had made reference to the purpose of the loan, it failed to consider that the second respondent had allowed or accommodated the customer to use it for a different purpose, as such the loan was granted for the purpose of refunding a loan due to him. Thus, the Industrial Court, failed to consider this aspect of conflict of interest.

In considering the second charge, that is, the second respondent in utilizing the facilities had directly or indirectly received or agreed to receive pecuniary benefit or advantage and thereby had contravened s. 115 of the Banking and Financial Institutions Act 1989, the Industrial Court made a finding that there is no convincing evidence that the second respondent benefited or made gains from the transaction. I am of the view that the Industrial Court had failed to consider that repayment of a loan due to the second respondent has benefited or given an advantage to the second respondent in that he is receiving monies due to him.

With regard to the third charge, that is, the second respondent added a signature to the specimen card of customers, the Industrial Court made a finding the second respondent was not involved, based on the testimonies of CCW2, CCW3 and CCW4 and the "unrebutted" evidence of the second respondent. I am of the view in making this finding the Industrial Court had again failed to consider the notes of inquiry which clearly showed that the second respondent had confirmed and admitted that he added the third signature to the specimen card. COW4 also testified in the Industrial Court that the second respondent had admitted to adding the signature.

To me, the Industrial Court's conclusion that all charges preferred against the second respondent were not proven is contrary to clear evidence. It is apparent from the records that the Industrial Court had misconstrued and misapplied the principles of law pertaining to the relevance of a valid domestic inquiry.

In conclusion, I am of the view that the applicant has demonstrated ample proof of errors of law and thereby compelling this court to exercise its judicial review powers to issue an order of *certiorari* to quash the award. Accordingly, the applicant's application is allowed with costs.